

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

WILLIAM D. GODBY,
Appellant,

DOCKET NUMBER
CH-1221-21-0147-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 14, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL¹

David Torchia, Esquire, Cincinnati, Ohio, for the appellant.

Matthew O. Kortjohn, Esquire, Dayton, Ohio, for the agency.

Nicholas Kennedy, Esquire, Akron, Ohio, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

¶1 The agency has filed a petition for review of the initial decision, which granted in part and denied in part the appellant's request for corrective action under [5 U.S.C. § 1221](#). Generally, we grant petitions such as this one only in the

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

¶2 Under the evidentiary framework of [5 U.S.C. § 1221](#), the Board first determines whether the appellant has established by preponderant evidence² that he made a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#) or engaged in protected activity under [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\)](#), (B), (C) or (D). See [5 U.S.C. § 1221\(e\)\(1\)](#); *Salerno v. Department of the Interior*, [123 M.S.P.R. 230](#), ¶ 5 (2016); [5 C.F.R. § 1209.7\(a\)](#). Next, the Board determines whether the protected disclosure or protected activity was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken. See [5 U.S.C. § 1221\(e\)\(1\)](#); *Salerno*, [123 M.S.P.R. 230](#), ¶ 5; [5 C.F.R. § 1209.7\(a\)](#). If the respondent makes both of these showings by preponderant evidence, the burden of persuasion shifts to the agency to demonstrate by clear and convincing

² Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. [5 C.F.R. § 1201.4\(q\)](#).

evidence³ that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure or other protected activity. *See* [5 U.S.C. § 1221\(e\)\(2\)](#); *Salerno*, [123 M.S.P.R. 230](#), ¶ 5; [5 C.F.R. § 1209.7\(b\)](#); *see also Carr v. Social Security Administration*, [185 F.3d 1318](#), 1322 (Fed. Cir. 1999).

¶3 In determining whether an agency has met its burden by clear and convincing evidence, the Board will consider the following factors, which were coincidentally first set forth in *Carr*: (1) the strength of the agency’s evidence in support of the personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr*, 185 F.3d at 1323. The Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence, but instead weighs the factors together to determine if the evidence is clear and convincing as a whole. *Elder v. Department of the Air Force*, [124 M.S.P.R. 12](#), ¶ 42 (2016). Our reviewing court has further clarified that “[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.”⁴ *Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1367-68 (Fed. Cir. 2021).

³ Clear and convincing evidence is that measure or degree of proof that produces in the mind of a trier of fact a firm belief as to the allegations sought to be established. [5 C.F.R. § 1209.4\(e\)](#).

⁴ The court made that statement in the course of explaining that Congress imposed a heightened burden of proof on the agency to compensate for the “evidentiary disadvantages” faced by whistleblowers. *Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1367-68 (Fed. Cir. 2021); *see* 135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment S. 20) (explaining that the higher burden of proof required of the agency “recognizes that when it comes to proving the basis of an agency’s decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the

¶4 In its petition for review, the agency contends that the administrative judge did not consider all the record evidence, as required under *Whitmore*. Petition for Review (PFR) File, Tab 1. However, as the administrative judge observed, the agency made no attempt below to show by clear and convincing evidence that, in the absence of the appellant’s whistleblowing, it still would not have selected him for the Operations Manager in 2017.⁵ Rather than acknowledge its burden of proof, the agency instead contended that the burden of proof was on the appellant to show that his qualifications were “plainly superior” to that of the selectee. Hearing Transcript, Day 3 at 623-24. In effect, the agency waived its opportunity to rebut the appellant’s prima facie case of retaliation.

¶5 The agency’s attempt to shift the burden of proof to the appellant is unavailing. On review, the agency argues that evaluating the selectee’s qualifications is “especially vital” in individual right of action (IRA) appeals of nonselections, because in nonselection cases arising under Title VII of the Civil Rights Act of 1964 (Title VII),⁶ a complainant can only prove an illegal hiring practice if his qualifications are “plainly superior” to those of the selectee. This is so, the agency argues, because “Title VII is not a vehicle for substituting the judgment of a court for that of the employer.” PFR File, Tab 1 at 9 (quoting *Jiminez v. Mary Wash. Coll.*, [57 F.3d 369](#), 377 (4th Cir. 1995)). While the agency concedes—as it must—that this case is not governed by Title VII, it

decision, and the records that could document whether similar personnel actions have been taken in other cases”). It is evident that in creating and interpreting the “clear and convincing evidence” standard, Congress and the *Whitmore* court were primarily concerned with ensuring that the interests of the whistleblower are protected. See *Whitmore*, 680 F.3d at 1368 (observing that the Whistleblower Protection Act “makes clear that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation”).

⁵ Conspicuously, the words “clear and convincing” appear nowhere in the hearing transcript or any of the agency’s pleadings below.

⁶ The petition refers to “Title VII of the Rehabilitation Act,” but we assume this was a drafting error.

asserts that “the principles underlying Title VII non-selection case law exist with equal force in this appeal” and that by failing to consider the qualifications of the selectee, “the Board is substituting its judgment for that of the Agency.” PFR File, Tab 1 at 9. However, the agency has not cited any authority to support its assertion that Title VII standards should apply in an IRA appeal of a nonselection, and we are not aware of any. Rather, the relevant statute makes it clear that in an IRA appeal, the burden lies with the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the appellant’s whistleblowing. [5 U.S.C. § 1221\(e\)\(2\)](#). As discussed above, the agency did not accept or attempt to meet that burden. Accordingly, we affirm the administrative judge’s finding that the appellant is entitled to corrective action with respect to his 2017 nonselection.

ORDER

¶6 We ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management’s regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency’s efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board’s Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶7 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board’s Order and of the actions it has taken to carry out the Board’s Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶8 No later than 30 days after the agency tells the appellant that it has fully carried out the Board’s Order, the appellant may file a petition for enforcement

with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶9 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set forth at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees and costs **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your motion for attorney fees and costs with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR
COMPENSATORY DAMAGES**

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other

reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at [5 U.S.C. §§ 1214](#)(g) or 1221(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.204.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, [5 U.S.C. § 1214](#)(g)(2), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will be referred to the Special Counsel “to investigate and take appropriate action under [5 U.S.C.] section 1215,” based on the determination that “there is reason to believe that a current employee may have committed a prohibited personnel practice” under [5 U.S.C. § 2302](#)(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D). [5 U.S.C. § 1221](#)(f)(3). Please note that while any Special Counsel investigation related to this decision is pending, “no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.” [5 U.S.C. § 1214](#)(f).

NOTICE OF APPEAL RIGHTS⁷

You may obtain review of this final decision. [5 U.S.C. § 7703](#)(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703](#)(b).

⁷ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(A\).](#)

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. [5 U.S.C. § 7703](#)(b)(2); *see Perry v. Merit Systems Protection Board*, [582 U.S. 420](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702](#)(b)(1). You must file any such request with the

EEOC’s Office of Federal Operations within **30 calendar days** after you receive this decision. [5 U.S.C. § 7702\(b\)\(1\)](#). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#) or other protected activities listed in [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁸ The court of appeals must receive your petition for

⁸ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on

review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.ca9c.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.



DEFENSE FINANCE AND ACCOUNTING SERVICE Civilian Pay Operations

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: <https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx>.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

- ☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

- ☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.
- ☐ 3) Signed and completed "Employee Statement Relative to Back Pay".
- ☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****
- ☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****
- ☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).
- ☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under [5 U.S.C. § 5551](#) for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63).
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected (if applicable).

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement (if applicable).
2. Copies of SF-50s (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.